Eu Lian Hang v President, Municipal Council, Petaling Jaya

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO 44–2 OF 1989
SHANKAR J
6 SEPTEMBER 1989

Public Authorities *— Town and country planning — Mandatory order — Owner of shop-house carried out illegal structural alterations — Local authority obtained mandatory order to demolish alterations — Whether mandatory order was valid — Whether owner should first be convicted before mandatory order could be made — Street, Drainage and Building Act 1974 ss 70(13)(b), (15) & 91(1)*

Public Authorities *— Town and country planning — Mandatory order — Owner of shop-house carried out structural alterations which deviated from approved plans — Local authority applied ex parte for mandatory order to demolish alterations — Whether mandatory order was valid — Whether owner was given opportunity to be heard before mandatory order was made — Street, Drainage and Building Act 1974 s 91(1)*

The applicant, the owner of a shop-house, submitted plans for structural alterations of the shop-house. The municipal council, the respondent, approved the applicant's plans and the applicant proceeded with the work. Subsequently the respondent discovered that the applicant had carried out works which deviated from the approved plans. The respondent then served a notice under s 72(1)(b) of the Street, Drainage and Building Act 1974 ('the Act') requiring the applicant to demolish the offending structure ('the notice'). The applicant did not comply with the notice and instead submitted amended plans to the respondent and applied for ex post facto approval of the deviations. The respondent rejected the applicant's application and applied ex parte for a mandatory order for the demolition of the applicant's offending structures under s 91(1) of the Act. The mandatory order was served on the applicant on 7 December 1988. The applicant did not comply with the order and appealed, inter alia, against the said order. The applicant's notice of appeal was dated 4 January 1989. The respondent argued that the time to appeal against the mandatory order would have run out ten days from the date of service of the mandatory order. The applicant accordingly applied to the High Court for extension of time to file an appeal against the mandatory order and for a stay of the order. The applicant argued that there were merits in his appeal because firstly, he was not given an opportunity of being heard before the mandatory order was made. The applicant also argued that before the mandatory order could be made, he must be convicted under s 70(13)(b) of the Act for carrying out unauthorized activity in deviating from the approved plans.

Held, dismissing the application;

(1) The applicant's structural alterations were illegal because they did not comply with the approved plans. If what the applicant did was

legal he could have challenged the notice. The notice was therefore an opportunity for the applicant to be heard. The applicant's application for approval of the amended plans was also rejected by the respondent. The respondent was thus entitled to remove the applicant's offending structure. A

(2) A conviction under s 70(13)(b) of the Act is not a precondition to the respondent's application for a mandatory order under s 91(1) of the Act. Section 91(1) of the Act gives the local authority an option to apply for a summary order while s 70(13)(b) of the Act makes unauthorized deviation from approved plans an offence by itself. Section 70(13)(b) read with s 70(15) of the Act constitutes an independent and separate provision from s 91 of the Act. B C

(3) There were accordingly no grounds for extending time to appeal. Nor was there any merit in the applicant's appeal.

[Bahasa Malaysia summary

Pemohon, tuan punya sebuah rumah-kedai, telah menyerahkan pelan bagi pemindaan struktur rumah-kedai itu. Majlis Perbandaran, responden, telah meluluskan pelan pemohon tersebut dan pemohon mula dengan kerja pemindaan. Responden kemudiannya mendapat tahu bahawa pemohon telah melaksanakan kerja-kerja yang melencong daripada pelan yang diluluskan. Responden selepas itu menyampaikan satu notis di bawah s 72(1)(b) Akta Jalan, Parit dan Bangunan 1974 ('Akta itu') mengkehendaki pemohon merobohkan struktur yang melanggar pelan yang diluluskan ('notis itu'). Pemohon tidak mematuhi notis itu tetapi sebaliknya telah menyerahkan pelan yang dipinda kepada responden dan memohon kelulusan ex post facto lencongan itu. Responden telah menolak permohonan pemohon dan membuat permohonan ex parte mendapat perintah mandatori untuk perobohan struktur pemohon yang melanggar pelan yang diluluskan di bawah s 91(1) Akta itu. Perintah mandatori telah disampaikan kepada pemohon pada 7 Disember 1988. Pemohon tidak mematuhi perintah itu dan membuat rayuan, antara lain, terhadap perintah itu. Notis rayuan pemohan bertarikh 4 Januari 1989. Responden berhujah bahawa masa untuk merayu terhadap perintah mandatori itu sepatutnya berakhir sepuluh hari daripada tarikh penyampaian perintah mandatori itu. Pemohon oleh kerana itu memohon kepada Mahkamah Tinggi untuk perlanjutan masa yang membolehkannya memfailkan satu rayuan terhadap perintah mandatori itu dan penggantungan perintah itu. Pemohon berhujah bahawa terdapat merit dalam rayuannya kerana pada pertamanya beliau tidak diberi peluang untuk didengar sebelum perintah mandatori itu dibuat. Pemohon juga berhujah bahawa sebelum perintah mandatori itu boleh dibuat, beliau semestinya disabitkan di bawah s 70(13)(b) Akta itu kerana melaksanakan aktiviti tanpa kebenaran dengan melencong daripada pelan yang telah diluluskan. D E F G H I

Diputuskan, menolak permohonan itu:

(1) Pemindaan struktur pemohon adalah menyalahi undang-undang kerana ianya tidak mematuhi pelan yang telah diluluskan. Jika apa

yang pemohon lakukan itu menuruti undang-undang, beliau sememangnya boleh mencabar notis itu. Notis itu oleh kerana itu adalah peluang untuk pemohon didengar. Permohonan pemohon untuk kelulusan pelan yang dipinda juga ditolak oleh responden. Responden dengan demikian berhak untuk menghapuskan struktur pemohon yang melanggar pelan yang telah diluluskan.

(2) Sabitan di bawah s 70(13)(b) Akta itu bukanlah satu prasyarat permohonan responden mendapat perintah mandatori di bawah s 91(1) Akta itu. Seksyen 91(1) Akta itu memberi pihak berkuasa tempatan satu opsyen memohon perintah terus sementara s 70(13)(b) Akta itu menyebabkan lencongan tanpa kebenaran daripada pelan yang diluluskan satu kesalahan dengan sendirinya. Seksyen 70(13)(b) dibaca dengan s 70(15) Akta itu menubuhkan satu peruntukan yang berasingan dan berlainan daripada s 91 Akta itu.

(3) Oleh kerana itu tiada terdapat sebarang alasan bagi melanjutkan masa untuk membuat rayuan. Tidak juga terdapat sebarang merit dalam rayuan pemohon.]

Legislation referred to

Street, Drainage and Building Act 1974 ss 70(13)(b), (15), 72(1)(b), 91(1), (3)(a), (b), 92, 94

Mohd Hanafiah bin Zakaria (Deputy Public Prosecutor) for the public prosecutor.

Atma Singh Veriah and *CC Choo* (*CC Choo & Co*) for the applicant.

Cur Adv Vult

Shankar J: This is an application by way of motion for an extension of time to file an appeal against a mandatory order made by the magistrate's court at Petaling Jaya for the demolition of certain structures in a building and for a stay of the mandatory order itself.

Eu Liang Hang ('Eu') is the owner of the shop-house No 3 Jalan 20/13 Petaling Jaya. He wished to make certain alterations to the basic structure. So he submitted plans for the approval of these alterations to the Municipal Council Petaling Jaya ('the council') as he was bound to do by law. The council approved the plans submitted and Eu went ahead with the work.

One of the many statutory duties of the council is to ensure that building work proceeds in accordance with plans which have been approved by the council. Failure to do so can attract sanctions under the Street, Drainage and Building Act 1974 ('the Act').

The council took the view that the works carried out constituted a deviation from the approved plans. So on 5 February 1988 it caused to be served on Eu a formal notice under s 72(1)(b) of the Act which reads in material particular as follows:

Demolition or removal of unauthorised building.

(1) Where the local authority is satisfied that a building has been erected or is in the course of erection or is about to be erected in contravention of section

70... the local authority may by notice served on the owner of the land require him to do any one or more of the following acts — A

(a) ...
(b) to demolish such building within such time as the local authority may specify; and
(c) ... B

In accordance with this section the notice in question contained both written and photographic particulars of the offending works and required Eu to demolish the same within seven days of being served with the notice. This notice was served on 5 February 1988. The notice stated that non-compliance would constitute an offence punishable with a fine of up to $250 for each day the offence continued. C

Eu did not comply with the notice. He submitted amended plans and applied to the council ex post facto for approval of the deviations. The council rejected this application. (This emerged not from any affidavits before me but in the course of final submissions in open court. I will comment on this later.) D

On 2 December 1988 a council officer inspected the shop-house and found the offending structure in situ. The notice under s 72(1)(b) of the Act dated 5 February 1988 had not been complied with. So she applied on 3 December 1988 for a mandatory order for the demolition of the offending structures as provided by s 91(1) of the Act.

This application was made ex parte. The mandatory order was made immediately and served on Eu on 7 December 1988. It required Eu to demolish forthwith certain structures specified in the notice, and within 14 days thereafter a spiral staircase. If he failed to obey the mandatory order Eu was required to appear in court on 29 December 1988 for further proceedings to be taken against him. E F

Once again Eu did not comply with the mandatory order. He appeared on 29 December 1988, and was convicted of an offence under s 70(13)(b) of the Act and fined $2,300 for failing to comply with the mandatory order.

Against this he filed a notice of appeal in the High Court at Kuala Lumpur. This notice states that it is an appeal against conviction, sentence and the mandatory order. It is dated 4 January 1989. G

Before me it was submitted for Eu that since the mandatory order was made in criminal proceedings on 3 December 1988 and served on 7 December, the time to appeal against it would have run out in ten days from the date of the order or at least ten days from the date of service ie 7 December. If this is correct then any *appeal*, if there was one, against the mandatory order was clearly out of time. H

As to enlargement of time it was submitted that Eu was unrepresented at the time. And it was submitted that there were merits in his appeal as the mandatory order was null and void because:

(1) He was not given an opportunity of being heard before the mandatory order was made. I
(2) A conviction under s 70(13)(b) of the Act was a condition precedent to the making of a mandatory order, and he had not yet been convicted.

(3) Unless it was first shown that the matter complained of was injurious or dangerous to public health an ex parte order should not be made.

I have earlier observed that Eu did not disclose in his affidavits in support of this application that he had submitted amended plans to obtain ex post facto approval of his deviations. His omission to disclose this is understandable because it would have cut the ground from under this feet.

At the heart of this matter is a simple question. Were the building works of which the council complained legal or illegal? If they did not comply with the approved plans they were illegal and the council was entitled to have them removed sooner or later.

The notice of 5 February 1988 was clearly an opportunity for Eu to be heard. If what he was doing was legal and in accordance with the approved plans he could have challenged the notice. He did not. The statement of Encik Mohamed Hanafiah bin Zakaria, counsel for the respondent, that Eu submitted amended plans has not been challenged. The application for approval of the amended plans was rejected. There is consequently no basis for this complaint.

The next submission of Eu's counsel is also misconceived. A conviction is emphatically not a precondition to an application under s 91(1) of the Act It reads as follows:

> Mandatory order.
>
> (1) Whenever any owner or occupier is required under this Act to perform any other work to which the provision of this Act apply, and such owner or occupier after due notice fails to perform such work within the specified time, the local authority may make a complaint and the Magistrate's Court upon hearing the complaint shall make on such owner or occupier a summary order, in this Act referred to as a "mandatory order", requiring such owner or occupier to execute the required work.

It is to be noted that this section gives the local authority an option (may) to apply for a summary order. But the work in question must be carried out by the building owner or occupier, in this case Eu. Section 91(3)(a) provides a maximum penalty of $250 per day for default and s 91(3)(b) gives the local authority power to carry out the work itself and recover the cost. The section is addressed to remedial works where unauthorized building activity has taken place. Any offence which it creates is related to the non-performance of the works required.

With respect to Eu's counsel, s 70(13)(b) of the Act makes the unauthorized activity in deviating from the approved plans an offence by itself. Again the section gives the council an option. If it chooses to exercise it, then Eu would have had to be prosecuted ie the case against him would have to be proved before a demolition order could issue under s 70(15).

In my view s 70(13)(b) read with s 70(15) constitutes an independent and separate provision from s 91. The former does not envisage the prior necessity of giving the offender a chance to put matters right before proceedings are launched. The latter section does. The notice dated 5 February 1988 was that chance.

The last submission of counsel had its basis in s 94 of the Act. With respect it is really irrelevant to the present case; since it related to special circumstances where a mandatory order for demolition can issue without any prior warning at all.

I have not found any of the cases cited by counsel of any assistance to me as they relate to other earlier Acts whose provisions have not been shown to be identical or even similar to the provisions I now have to consider.

In the result I regret that not only do I find that there are no grounds whatsoever for extending time as prayed for by counsel for Eu but also I do find that there are no merits whatsoever in the appeal.

By a series of technicalities the appellant has fended off the consequences of his unauthorized activity for a considerable period. At $250 per day from 5 February 1988 the fine to which he was vulnerable was very considerable. Assuming that some allowance should be made for the period when the processing of the amended plans were pending there were no extenuating circumstances from the day they were rejected. That date is not in evidence before me, but there is every indication that the appellant has been very lightly treated.

Whether the authorities want to prosecute under s 70(13)(b) of the Act or move under s 91(3)(b) is of course up to the respondent if the illegal structures are still standing.

As far as the present application is concerned, for the reasons aforesaid I dismiss it. I also dismiss the application for stay of proceedings as regards the order made on 3 December 1988.

The parties will address me on the implications of s 92 of the Act both as regards the continuing fine to be imposed and the costs of these proceedings on 23 September 1989 at 9.30am.

Application dismissed.

Reported by Wong Kian Kheong